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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 705

ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "Bob" Kercheval, otherwise called "Dave" Kercheval, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals appears at page 70 of the record, and is reported in 12 F. (2d) 904.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered May 4, 1926. (R. 79.) The court denied a petition for rehearing on July 26, 1926 (R. 79). A petition for writ of certiorari under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, was filed October 26, 1926, and granted November 29, 1926. (R. 80.)

STATEMENT

Petitioner was indicted in the Western District of Arkansas, Texarkana Division, under Section 215 of the Penal Code, for using the mails to defraud. (R. 2–25.) To this indictment petitioner entered a plea of guilty (R. 30), and subsequently thereto was allowed to withdraw the plea of guilty and substitute a plea of not guilty (R. 33). He was then tried and convicted. (R. 25–27.)

At the trial, the United States Attorney stated in his opening to the jury that petitioner had once pleaded guilty (R. 29), and later introduced in evidence the said plea (R. 30). The only assignments of error before this Court relate to this statement by the District Attorney and to the introduction in evidence of the plea of guilty. (R. 28.)

By stipulation (R. 80) the evidence upon the merits has, in printing the transcript, been omitted from the bill of exceptions. The bill of exceptions, as printed, does, however, contain a great deal of evidence upon the question as to whether the plea of guilty had been voluntary. This question was opened by petitioner himself, who testified that the plea had been the result of an agreement with the Assistant District Attorney that he should receive a light sentence. (R. 32–39.) The Government then cross-examined the petitioner (R. 39–57) and produced the District Attorney (R. 57–62) and the Post-office Inspector (R. 63–67) as rebuttal witnesses, all to the effect that it had been necessary to return petitioner from New York to

the Western District of Arkansas under custody of a marshal, and that upon his return he had been informed by the District Attorney that no recommendation of a light sentence would be made to the court.

ASSIGNMENTS OF ERROR (R. 28)

Petitioner's assignments of error are two:

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> The court erred in permitting Judge James D. Shaver, counsel for the Government, to state in his opening statement to the jury that defendant had entered his plea of guilty and then withdrawn it, and in refusing to reprimand counsel for making that remark in his opening statement.

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> The court erred in permitting the plaintiff, over the objection of the defendant made at the time, to introduce and read in evidence the Exhibit No. 44, which is a formal plea of guilty by defendant on charges in this indictment.

If the plea is a proper item of evidence, necessarily the District Attorney must be entitled to refer to it in his opening statement. These assignments therefore present a single question for consideration by this Court—whether after a plea of guilty has been withdrawn by leave of court, that plea may be introduced in evidence by the Government in the subsequent trial upon the merits.

No assignment of error has been presented upon the question of the voluntary character of petitioner's plea, thereby recognizing that the question is one properly to be determined by the jury. The charge of the court upon the point was as follows (R. 69):

> The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included [sic], and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case.

SUMMARY OF ARGUMENT

The authorities are practically evenly divided upon the express question here involved. It has, however, been universally held that a plea of guilty or a judicial confession, entered to the same or a similar charge in a different court of the same or a different jurisdiction, is admissible in evidence. That type of case can only be distinguished from the case at bar, in which the same court which allowed the withdrawal of the plea of guilty later admitted it in evidence, upon the theory that the court has in some way made a bargain with the accused. But the trial of a case is not the playing of a game, and while the defendant is entitled to a fair trial without the introduction of incompetent evidence to his prejudice, the use against him of admissions or confessions voluntarily made by himself does not make the trial unfair. Such admissions, whether made in court or *in pais*, are evidence for what they are worth, provided only that they have been voluntary.

ARGUMENT

IT WAS NOT ERROR TO ADMIT IN EVIDENCE A PRIOR PLEA OF GUILTY ENTERED BY THE SAME DEFENDANT TO THE SAME INDICTMENT

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evi-

dence they are satisfied it was not the voluntary act of the defendant." *Wilson* v. *United States,* 162 U. S. 613, 624; *Kent* v. *Porto Rico,* 207 U. S. 113, 118–119. Compare *Wan* v. *United States,* 266 U. S. 1, 16, in which "the undisputed facts showed that compulsion was applied." In the case at bar the voluntary character of the confession was in dispute and was properly submitted to the jury under the instruction of the court. (R. 69.)

Petitioner, however, draws a line between extra-judicial and judicial confessions, and, further, between judicial confessions or pleas before another or lower court and judicial confessions or pleas before the same court in which the trial is had. Extra-judicial confessions, and judicial confessions or pleas before another court, are concededly admissible as evidence. But, the argument runs, judicial pleas before the same court provide a unique exception to the universal rule of law and of human conduct that an adult is responsible for his voluntary acts or statements. When the court has of grace permitted such a plea to be withdrawn and the defendant to stand trial on the merits, some sort of estoppel is invoked against the court to prevent it from submitting to the jury with the other evidence of defendant's acts or admissions this evidence of defendant's admission, voluntarily made before itself. It is said that an Anglo-Saxon sense of justice is shocked by the idea that defendant does not start the race in court abreast of the Gov-

ernment. This may be true of a justice which still relies upon trial by battle or the ordeal.

But justice is no longer a game. See *McGuire* v. *United States,* No. 85, October Term, decided by this Court on January 3, 1927. It is a search for truth.

Turning to the authorities, we will consider, first, the cases in point and, then, the cases which appear to provide useful analogies.

(a) CASES IN POINT

In the Federal courts there appear to be only two cases applicable, one in the Court of Appeals of the District of Columbia in which the court divided, two justices holding against the Government and the Chief Justice dissenting (*Heim* v. *United States,* 47 App. D. C. 485; certiorari denied 247 U. S. 522), and the other being the case at bar, in which the court unanimously upheld the admission of the evidence.

In the State courts, the cases of *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516; *Heath* v. *State* (Crim. Ct. App. Okla.), 214 Pac. 1091; and *People* v. *Ryan,* 82 Cal. 617, 23 Pac. 121, hold the evidence inadmissible. In neither the *Meyers* nor *Ryan* opinions, however, are any cases cited. Dicta to the same effect are found in the Georgia case of *White* v. *State,* 51 Ga. 285, 289, and the Florida case of *Green* v. *State,* 40 Fla. 474, 24 So. 537.

It is important to remark that the *Ryan* case was expressly overruled in California in *People*

v. *Boyd,* 67 Cal. App. 292, 227 Pac. 783, 787. The *Boyd* case involved only an offer to plead guilty to one count, but the Supreme Court in denying a petition to have the cause heard in that court after affirmance in the District Court of Appeal expressly stated (p. 303) that the *Ryan* case "seems to be out of harmony with what we believe to be the correct and the better rule."

In addition to California, the rule in Connecticut, Kentucky, and New York is to the effect that a prior plea of guilty in the same proceeding is admissible upon the trial after the withdrawal of such plea. *State* v. *Carta,* 90 Conn. 79, 96 Atl. 411; *Commonwealth* v. *Ervine,* 8 Dana (Ky.) 30; *People* v. *Jacobs,* 165 App. Div. (N. Y.) 721.

In the Connecticut case of *State* v. *Carta,* both the majority and the minority of the court rendered carefully considered opinions. In the majority opinion the evidence is upheld, not as conclusive, but as "showing conduct on the part of the accused which was inconsistent with his claim of innocence before the jury," and it is pointed out that the plea in reality stands upon the same ground as a plea given in a lower, or magistrate's court, which is concededly admissible. The *Meyers* case in Missouri and the *Ryan* case in California are distinguished as cases in which the evidence was admitted as conclusive. The dissenting opinion, on the other hand, invokes "considerations of fairness" to the effect that "the withdrawal eradi-

cated" the plea. The *Carta* case and the *Heim* case present the most carefully considered opinions, and the same arguments and in general the same authorities are found in both. The two courts present an equal division of opinion.

It appears, therefore, that there is a remarkably even balance among the authorities, and that the case should turn upon the question as to what in reason is the better practice. The textbooks cited in the majority opinion in the *Heim* case, and in petitioner's brief, at p. 10, relied only upon the *Ryan* case, since overruled, and upon two or three other cases not in point. Their strength as authority is obliterated by reference to the later textbooks, which point out that the question is an open one upon which there is a conflict in the decisions. *Wigmore on Evidence* (2d Ed.) vol. II, sec. 1067, p. 551; 16 *Corpus Juris*, 631.

(b) ANALOGOUS CASES

The general rule is of course that extra-judicial confessions voluntarily given are admissable as evidence. A further development of that rule is that actual pleas of guilty entered to the same or similar charges in other courts are admissible. An examination of the authorities has disclosed to us no cases in which such judicial confessions have been excluded where they were voluntarily given, and the authority to the contrary is overwhelming.

Cases in which a plea of guilty before the committing magistrate has been held to be admissible upon a later trial on the merits in the higher court:

United States v. *Alonso,* 8 P. I. 78;

King v. *Burke,* Quebec (K. B.) 19 Can. Crim. Cases 141;

Bibb v. *State,* 83 Ala. 84, 3 So. 711;

Green v. *Florida,* 40 Fla. 474, 24 So. 537;

State v. *Briggs,* 68 Iowa 416, 27 N. W. 358;

Ehrlick v. *Commonwealth,* 125 Ky. 742, 102 S. W. 289;

State v. *Call,* 100 Me. 403, 61 Atl. 833;

Commonwealth v. *Brown,* 150 Mass. 330, 23 N. E. 49, and *Commonwealth* v. *Hazeltine,* 108 Mass. 479;

Carter v. *State* (Sup. Ct., Miss.), 24 So. 307;

State v. *Hand,* 71 N. J. L. 137, 58 Atl. 641, and *State* v. *Fairbrothers* (N. J.), 99 N. J. L. 295, 124 Atl. 452;

State v. *Hermanson,* 22 N. D. 125, 132 N. W. 415;

Rice v. *State,* 22 Tex. Cr. App. 654, 3 S. W. 791, and *Beason* v. *State,* 43 Tex. Cr. App. 442, 67 S. W. 96;

State v. *Bringgold,* 40 Wash. 12, 82 Pac. 132.

Case in which plea of guilty in a State court has been admitted as evidence on trial for the same offense under a city ordinance:

City of Columbia v. *Jackson* (Kansas City, Mo., Ct. App.) 227 S. W. 644.

Cases in which a plea of guilty in the Federal court has been admitted in a State prosecution for the same offense:

Nuby v. *State*, 19 Ala. App. 424, 97 So. 767;

Outz v. *State*, 29 Ga. App. 403, 116 S. E. 123;

McCarty v. *Commonwealth*, 200 Ky. 287, 254 S. W. 887, and *Addington* v. *Commonwealth*, 200 Ky. 290, 254 S. W. 889.

Cases in which an offer to plead guilty has been held properly admitted in evidence:

Abrams v. *State*, 121 Ga. 170, 48 S. E. 965;

Commonwealth v. *Callahan*, 108 Mass. 421;

People v. *Gould*, 70 Mich. 240, 38 N. W. 232.

(c) REASON

The universal policy of the law to admit voluntary judicial pleas of guilty as well as voluntary extra-judicial confessions is evident. The only ground of distinction between these cases and the case at bar would be on the assumption that the court in allowing the withdrawal of the plea of guilty has in some way made a bargain with the defendant that though, upon principle, the plea is relevant as evidence, nevertheless the court will not allow it to be used. Such a distinction appears to be a phase of the theory of justice which regards

the trial of a suit as the playing of a game. Its adoption would represent a step backward in the development of our criminal jurisprudence. The penalties for crime are no longer so severe as to lead the courts to invent technical arguments in the interest of so-called mercy. As pointed out by Chief Justice Smyth in his dissenting opinion in the District of Columbia Court of Appeals (47 App. D. C. at p. 497):

> Something is said about the humanity of the rule which opposes the admission of the plea, and inferentially the inhumanity of its converse. But if it is not inhuman to admit a confession of guilt before a magistrate, how does it become so to admit one made before a trial judge after greater time for thought by the defendant?
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> In the case at bar the defendant objected to the admission of the plea because, as he alleged, it had not been voluntarily made. Thus the burden was thrown upon the Government to lay the proper foundation for its introduction, and the court in receiving it without such foundation erred; but the defendant extracted from this error all its vice by assuming the responsibility of showing that the plea was not voluntarily made, and then requesting the court to instruct the jury that, if they found it was not so made they should disregard it, which request was granted. We must assume that the jury, if they attached any value to the plea, decided that it was voluntary; hence the error committed in admitting it is not reversible.

The bar associations of the country, writers on juridical subjects, sociologists, and others who have given thought to the matter, complain of the great laxity which exists in the administration of our criminal law. They point out that one who can, through the skill of counsel, avail himself of all the opportunities the law affords for escape, may have little fear of punishment; that the course between an indictment and the final conviction, which may be made very long, has numerous byways for escape; and that as a result there is little respect for our criminal law in certain quarters.

However this may be, I am not willing, in the absence of legislation, and especially after Congress has indicated a contrary view (36 Stat. at L. 352, chap. 216, supra), to make more difficult the Government's work in attempting to bring to justice men charged with crime. Such men are undoubtedly entitled to a fair trial, but they are not deprived of such a trial by the court admitting in evidence against them their own voluntary statements.

The judgment should be affirmed.

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JANUARY, 1927.

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